UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

REALTIME DATA LLC d/b/a IXO, Plaintiff, v. RACKSPACE US, INC.; NETAPP, INC.; and SOLIDFIRE, LLC, Defendants.	**LEAD Case No. 6:16-cv-961-RWS-JDL**

PLAINTIFF REALTIME DATA LLC'S SUR-REPLY TO NETAPP, INC. AND SOLIDFIRE, LLC'S MOTION TO STRIKE INFRINGEMENT CONTENTIONS AND COMPEL COMPLIANCE UNDER P.R. 3-1 (DKT. NO. 117)

A. Realtime's Initial Contentions Provide the Requisite Notice

NetApp admits that the infringement contentions for ONTAP are sufficiently specific. Reply at 5 ("Realtime's second amended contentions for ONTAP make clear that Realtime is capable of providing specific contentions based on publicly available information."). NetApp's repeated assertion that Realtime's contentions for the AltaVault, SolidFire, and Mars OS products only "mimic the claim language" (Reply at 1) is still wrong. As explained in Realtime's opposition, in addition to textual explanations, the contentions provide hundreds of pages of specific evidence from NetApp's public documents illustrating where each element of each asserted claim is found. NetApp's apparent position that the Court should simply ignore this evidence and consider only the limited excerpts mentioned in NetApp's motion is nonsensical and contrary to law. *See, e.g.*, *Mobile Telecomms. Techs., LLC v. Sprint Nextel Corp.*, No. 2:12-CV-832-JRG-RSP, 2014 WL 12609359, at *3 (E.D. Tex. Apr. 25, 2014).

NetApp's new argument that the evidence cited in Realtime's contentions is deficient contradicts its original argument—that the contentions merely "mimic the claim language"—and in any event is also meritless. In *SSL Services, LLC v. Cisco Sys., Inc.*, No. 2:15-cv-433-JRG-RSP, 2016 WL 727673 (E.D. Tex. Feb. 24, 2016), the court *rejected* a bright-line rule requiring that infringement contentions must always provide narratives and held that citing to evidence regarding the accused products may be sufficient to meet the requirements of P.R. 3-1. NetApp's reply misrepresents the court's holding. The court in *SSL Services* did *not* impose any requirement that the cited evidence must "identif[y] key claim terms by name," as NetApp contends. *See* Reply at 2. Rather, the court held that citing to evidence may be sufficient. *SSL Services*, 2016 WL 727673, at *8.[1] As explained in Realtime's opposition, the evidence and

[1] *See also L.C. Eldridge Sales Co. v. Azen Mfg. Pte., Ltd.*, No. 6:11-CV-599, 2013 WL 7937026, at *6 (E.D. Tex. Oct. 11, 2013) ("[N]or does a plaintiff have to refer to a defendant's product by 'some unique, in-house name or number … product line or model number.' Local Patent Rule 3-1 only requires that level of disclosure '*if known*.'" (emphasis added); *Whipstock Servs., Inc. v. Schlumberger Oilfield Servs.*, No. 6:9-cv-113, 2010 WL 143720, at *1 (E.D. Tex. Jan. 8, 2010) ("P.R. 3-1 requires only that the 'identification shall be as specific *as possible*. . . . Each method or process must be identified by name, *if known*.") (emphasis in original).

explanations[2] provided in the contentions speak for themselves.

NetApp's attempt to distinguish *Thomas Swan & Co. v. Finisar Corp.*, No. 2:13-CV-178-JRG, 2014 WL 12599221 (E.D. Tex. Apr. 16, 2014) solely on the grounds that this case involved different claim limitations and different accused products also fails. *See* Reply at 2. Obviously, the particular limitations and evidence in that case are different. But the court's refusal to strike the plaintiff's contentions "simply because they identify similar or identical code as meeting multiple elements" is nonetheless applicable here. *See id.* Notably, NetApp still has not cited a single case to support its position that citing similar evidence for similar and/or related claim limitations renders the contentions deficient. NetApp's speculative assertion that Realtime could circumvent P.R. 3-1 because "arguably all of the limitations 'relate to' the compression step" (Reply at 2) has no basis in fact or law. There is no dispute that Realtime did not cite the same evidence for all of the claim limitations. And the example discussed in NetApp's motion and Realtime's opposition (claim 105 of the '506 patent) makes clear that Realtime cited similar evidence for some limitations only where appropriate. Limitation 105(c) relates to "compressing said data block," and limitations 105(d) and (e) directly relate to the conditions under which the data block is compressed ("[105(d)] wherein if one or more encoders are associated to said type, *compressing said data block* with at least one of said one or more encoders, [105(e)] *otherwise compressing said data block* with a default data compression encoder").

NetApp's assertion that the contentions state that "the 'deduplication function' satisfies the limitations claiming two different 'compression technique[s]'" (Reply at 2) is misleading and wrong. Nowhere in the contentions does Realtime state that deduplication satisfies *both* compression techniques, as NetApp contends. Rather, the contentions make clear that deduplication is a different form of compression, and that deduplication and what NetApp separately calls "compression" therefore satisfy the limitations that require a first and second

[2] NetApp's reply falsely suggests that Realtime admitted that the contentions rely on only the cited evidence. Reply at 1 ("Realtime's opposition confirms that it is unable to do more, arguing that the evidence 'speaks for itself.'"). The opposition, however, states: "The evidence *and explanations* provided in Realtime's contentions speak for themselves." Opp'n at 4.

compression technique. *See, e.g.*, NetApp Ex. 12, Chart D-2 at 7-11.[3] NetApp's assertion that the contentions do not identify the data type, encoder, processor, and data accelerator elements is also wrong and contradicted by the very charts cited in NetApp's reply. The contentions provide explanations and screenshots from NetApp's public documents identifying where these elements are found. Although the contentions do not identify these components by an internal name or number, that is not required under P.R. 3-1. *See L.C. Eldridge Sales*, 2013 WL 7937026, at *6.

B. Realtime's Contentions Regarding DOE Are Sufficiently Specific

Not only does NetApp continue to mischaracterize Realtime's infringement contentions as it did in its motion, it also mischaracterizes Realtime's opposition. NetApp asserts the following: "Unable to point to any language expressly identifying the alleged equivalent, Realtime argues that the equivalent can be inferred 'in the context of the entire contentions.' (Opp'n at 10)." Reply at 3. NetApp has deliberately taken this quote out of context to misrepresent Realtime's argument. Realtime did *not* argue that the alleged equivalent can be inferred from the context of the contentions, but rather that the antecedents of the purportedly ambiguous pronouns (e.g., "it") could be inferred from the context. Opp'n at 10 ("When read in the context of the entire contentions ***for this limitation***, including the portion omitted by NetApp, 'it' is clearly referring to the identified equivalent[.]"). NetApp has no response to this argument.

NetApp's repeated assertion that the contentions are deficient because they rely on similar DOE theories for similar limitations fails for the same reasons discussed above and in Realtime's opposition. *See Thomas Swan*, 2014 WL 12599221, at *2. And NetApp's attempt to distinguish *MediaTek Inc. v. Freescale Semicon., Inc.*, No. 11-cv-5341 YGR, 2014 WL 2854773 (N.D. Cal. June 20, 2014) on the ground that the plaintiff in *MediaTek* identified the asserted

[3] NetApp's assertion that the contentions "allege that the 'deduplication function' satisfies many other different limitations" (Reply at 3 & n.3) is also false. For example, NetApp cites the "limitations relating to 'analyzing data … to determine a type'" in chart A-2. But the contentions do not merely assert that the "deduplication function" satisfies these limitations. The contentions identify "hardware and/or software identifying whether or not a particular block has been previously stored by the Accused Instrumentality and executing the deduplication function." Chart A-2 at 17-18, 27-30. NetApp similarly mischaracterizes the other limitations cited in footnote 3 of its reply.

equivalent by name also fails. Realtime's DOE contentions are more specific than the DOE contentions held to be sufficient by the court in *MediaTek* and should likewise be upheld here. *See id.* at *1. The mere fact that Realtime did not identify the equivalent by an internal name (if there even is one) is inconsequential. *L.C. Eldridge Sales*, 2013 WL 7937026, at *6.

C. NetApp's Discovery Responses and Declarations Confirm that Its Purported Ignorance of Realtime's Theories Is Disingenuous

NetApp simply cannot avoid the fact that its own discovery responses expressly and unequivocally state that "**[t]he Realtime Nov. '16 Infringement Contentions rely on deduplication as a form of compression**." Liao Decl., Ex. 1 at 9. That these responses also allege, with respect to *other limitations*, the contentions purportedly fail to sufficiently identify certain elements, does not somehow change this fact. And the portion from page 10 of the discovery responses cited in NetApp's reply (at 4) only further reinforces that NetApp understood Realtime's theories regarding the two compression techniques. *See* Liao Decl., Ex. 1 at 10 ("To the extent that Realtime argues that a 'deduplication function' satisfies 'content dependent data compression encoder' under DOE, *such as with respect to claim 104 of the '506 patent*, deduplication is substantially different than compression." (emphasis added)). If NetApp did not understand Realtime's theories, as it contends, then it would not be able to make such substantive arguments disputing their merits. Likewise, although NetApp's declarants purported to characterize Realtime's contentions as not technically detailed, they clearly understood the contentions well enough to provide substantive sworn testimony regarding whether NetApp developed the accused features. *See* Dkt. No. 110-2 ¶¶ 7-10; Dkt. No. 112 ¶¶ 7-10. Notably, NetApp does not dispute that Realtime's infringement theories are also spelled out in its complaint. *See* Opp'n at 8 (citing FAC (Dkt. No. 24) at ¶¶ 18-20). NetApp's purported ignorance as to Realtime's infringement theories is disingenuous and should be rejected.

D. NetApp Does Not Dispute That Its Requested Relief Is Improper

As explained in Realtime's opposition, even assuming that the contentions are technically deficient under P.R. 3-1, NetApp's extraordinary request that the Court strike the contentions for three of the four accused products is unsupported and, indeed, contradicted by the very authority cited by NetApp. *EON Corp. IP Holdings, LLC v. Sensus USA Inc.*, No. 6:09-CV-116, 2010 WL 346218, at *4 (E.D. Tex. Jan. 21, 2010) ("***The appropriate avenue for correcting [] deficiencies is to afford [plaintiff] the opportunity to supplement its contentions. … [S]triking [the] contentions is inappropriate***."); *see also KI Ventures, LLC v. Fry's Elecs., Inc.*, 579 F. App'x 985, 991 (Fed. Cir. 2014) (holding that striking deficient contentions was an abuse of discretion).

NetApp's reply is completely silent on this issue. NetApp's reply also fails to address, let alone refute, any of the arguments and authority in Realtime's opposition that clearing the Docket Control Order is unwarranted in the event supplementation is required. Nor does NetApp provide any argument or authority in support of its request for sanctions. NetApp apparently concedes each of these points, and its motion should be denied on this basis alone.

To the extent Realtime's contentions are found deficient, NetApp has not identified any real prejudice (it apparently abandoned its legally incorrect argument that Realtime's infringement theories are necessary for claim construction). Moreover, NetApp has been on notice of Realtime's infringement theories from the beginning, as it admitted in discovery. NetApp's complaints about the specificity of the contentions are even further undermined by Realtime's good faith attempts to address NetApp's purported concerns, and by NetApp's delayed production of highly relevant engineering documents. The fact that NetApp was not necessarily required to produce these documents before the P.R. 3-1 deadline is inconsequential. *See Thomas Swan*, 2014 WL 12599221, at *2 (delayed production of relevant documents—"although not a technical violation of its discovery obligations—runs contrary to the stated purpose of this District's local patent rules and reduces the parties' ability to resolve issues without Court intervention.").[4] NetApp's motion should be denied.

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[4] NetApp admits that initially it only made the hundreds of thousands of pages of engineering documents available for inspection on its source code computer. Reply at 5 n.5. Contrary to NetApp's assertions, this is not authorized under the protective order. Accordingly, NetApp reproduced these documents to Realtime in April—months after the P.R. 3-1 deadline and after Realtime served its second supplemental contentions.

Dated: April 24, 2017

Respectfully submitted,

By: /s/ C. Jay Chung

Marc A. Fenster (CA SBN 181067)
Email: mfenster@raklaw.com
Brian D. Ledahl (CA SBN 186579)
Email: bledahl@raklaw.com
Reza Mirzaie (CA SBN 246953)
Email: rmirzaie@raklaw.com
Paul Kroeger (CA SBN 229074)
Email: pkroeger@raklaw.com
C. Jay Chung (CA SBN 252794)
Email: jchung@raklaw.com
Jeffrey Z.Y. Liao (CA SBN 288994)
Email: jliao@raklaw.com
Christian Conkle (CA SB No. 306374)
Email: cconkle@raklaw.com
RUSS AUGUST & KABAT
12424 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90025
Telephone: 310/826-7474
Facsimile 310/826-6991

T. John Ward, Jr. (TX SBN 00794818)
E-mail: jw@wsfirm.com
Claire Abernathy Henry (TX SBN 24053063)
E-mail: claire@wsfirm.com
WARD, SMITH & HILL, PLLC
P. O. Box 1231
Longview, Texas 75606
Tele: 903/757-6400
Facsimile 903/757-2323

Attorneys for Plaintiff
REALTIME DATA LLC d/b/a IXO

CERTIFICATE OF SERVICE

I hereby certify that the counsel of record who are deemed to have consented to electronic service are being served on April 24, 2017, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ C. Jay Chung